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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 ELF-MAN, LLC, } Case No.: 2:13-CV-00395-TOR
9 Plaintiff, }
10 v. }
11 RYAN LAMBERSON, } REPLY MEMORANDUM IN
12 Defendant. } SUPPORT OF PLAINTIFF'S
13 } MOTIONS IN RESPONSE TO
14 } DEFENDANT'S FIRST AMENDED
15 } ANSWER AND AFFIRMATIVE
16 } DEFENSES TO PLAINTIFF'S
17 } FIRST AMENDED COMPLAINT;
18 } AND COUNTERCLAIM
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14 Defendant has submitted a memorandum in opposition to Plaintiff's
15 Motions in Response to Defendant's First Amended Answer and Affirmative
16 Defenses to Plaintiff's First Amended Complaint; and Counterclaim. ECF No. 25.
17 For the reasons set forth herein, Plaintiff submits that Defendant's positions are
18 not well taken and that its motions should be granted.

19 **Reply to "FACTS" Section (ECF No. 25 at pp. 1-5)**

20 Before setting forth his legal arguments, Defendant includes five pages
21 which consist of a diatribe concerning the status of discovery, references to actions
22 purportedly taken by Quentin Tarantino and "Prince" Rogers Nelson, and other
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1 extraneous matter. *Id.* at pp. 1-5. The accompanying declaration of counsel
 2 addresses the status of discovery and Defendant's unsubstantiated claims as to the
 3 evidence of infringement in this case.

4 His introductory section also makes the untenable claim that because several
 5 of the persons identified in Plaintiff's FRCP 26(a) Initial Disclosures have
 6 addresses in Germany that the subject infringement is somehow "extraterritorial."
 7 ECF No. 25 at pp. 2-3. Defendant cites to *Subafilms LTD v. MGM-Pathe*
 8 *Communications, Inc.*, 24 F.3d 1088, 1094 (9th Cir. 1994), in support of his
 9 position. This decision's discussion of extraterritorial infringement is inapposite.
 10 The infringement at issue in this action did not occur in Germany. As Plaintiff's
 11 First Amended Complaint alleges, it occurred within this judicial district through
 12 the IP address assigned to Defendant by Comcast, his U.S. ISP. ECF No. 3 at p.
 13 11, ¶¶ 80-83 Defendant's argument based on the address of Plaintiff's witnesses
 14 is specious.

15 Defendant is equally misguided in claiming that Plaintiff lacks standing to
 16 pursue this action, citing to the Ninth Circuit's decision in *Righthaven, LLC v.*
 17 *Hoehn*, 716 F.3d 1166, 1169 (9th Cir. 2013). ECF No. 25 at pp. 3-4. He cites to a
 18 complaint filed in another district by other counsel on behalf of Vision Films, Inc.,
 19 Plaintiff's sales agent with respect to *Elf-Man*. *Id.* Because Plaintiff is the
 20 registered owner of the copyright to this motion picture, see First Amended
 21 Complaint, ECF No. 3 at p. 4, ¶ 16, under *Righthaven*, Plaintiff has standing to
 22 bring this action in a district within the Ninth Circuit. In *Righthaven*, the Ninth
 23 Circuit concluded that an assignee granted limited rights with respect to copyright

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1 enforcement lacked standing to assert the subject claim for infringement. As such,
 2 depending on the terms of any assignment, if this action were brought by an
 3 assignee of Plaintiff's rights that party might not have standing under *Righthaven*.
 4 As the registered owner of the copyright at issue, nothing in *Righthaven* calls
 5 Plaintiff's standing into question. Of course, whether Vision Films, Inc. has
 6 standing to bring an action in the Eastern District of Tennessee pursuant to Sixth
 7 Circuit law is for Vision Films, Inc., its counsel and, ultimately, that tribunal to
 8 determine.

9 Lastly, this section claims that Defendant has proffered a proposed second
 10 amended answer "which expressly addresses each issue raised by plaintiff's
 11 motion." ECF No. 25 at p. 5. This statement is inaccurate. Defendant's proposed
 12 second amended answer would remedy some but by no means all of the defects of
 13 his first amended answer. Moreover, as explained in Plaintiff's memorandum in
 14 opposition to Defendant's motion to file a second amended answer, Defendant's
 15 explanations as to why he seeks to withdraw his first amended answer does not
 16 withstand scrutiny. ECF No. 24 at pp. 2-4. It is clear that he seeks to withdraw
 17 his ill conceived state law claims in order to avoid an adverse ruling.

18 **Reply to "LEGAL ARGUMENT" Section (ECF No. 25 at pp. 6-20)**

19 **I Plaintiffs Special Motion to Strike Defendant's State Law
 Counterclaims Should be Granted.**

20 Relying upon a law review article and a decision construing California's
 21 anti-SLAPP statute, Defendant argues that his state law counterclaims do not
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1 constitute SLAPP claims.¹ ECF No. 25 at p. 6. This ignores the clear and
 2 unequivocal language of the Washington statute, which includes the following in
 3 its definition of "action involving public participation and petition:

4 "(a) Any oral statement made, or *written statement or other document submitted*, in a legislative, executive, or *judicial proceeding* or other
 5 governmental proceeding authorized by law;

6 "(b) Any oral statement made, or *written statement or other document submitted, in connection with an issue under consideration or review* by a legislative, executive, or *judicial proceeding* or other
 7 governmental proceeding authorized by law;"

8 RCW 4.25.525(2) (emphasis added).

9 Although Defendant now argues that his counterclaims "are based on
 10 plaintiff's entire unlawful business scheme" and not merely on this litigation, ECF
 11 No. 25 at p. 6, his counterclaims are not so stated in his first amended answer. His
 12 purported factual basis for each state law counterclaim is based on actions taken or
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14 ¹While decisions construing California's anti-SLAPP legislation can be
 15 useful in construing the Washington statute, this Court has cautioned that because
 16 the statutes are not identical the citation of California decisions as persuasive
 17 authority must take account of these differences. *See Jones v. City of Yakima*
 18 *Police Dep't.*, Case No. 12-CV-3005-TOR at p. 3 (E.D. Wash., May 24, 2012) (a
 19 copy of which is attached to Plaintiff's motions in response to Defendant's first
 20 amended answer, ECF No. 20, as Attachment 1).

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1 allegedly taken in this litigation or in unidentified statements made in conjunction
2 with this action. *See* Plaintiff's motions in response to this pleading, ECF No. 20
3 at pp. 5-7. His gloss on decisional law from the Western District of Washington
4 and California regarding the Washington act, ECF No. 25 at pp. 7-8, does not
5 trump the fact that his retaliatory counterclaims fall within the express terms of
6 RCW 4.25.525(2).

7 Defendant recognizes that under RCW 4.24.525 upon a showing that claims
8 are subject to the Act's terms, the burden shifts to the moving party to show a
9 probability of prevailing. ECF No. 25 at p. 8. He then claims that he
10 "demonstrates a probability of prevailing on his counterclaims, *infra*." *Id.*
11 Defendant, of course, has made no such showing. Indeed, on the first business day
12 after the filing of Plaintiff's RCW 4.24.525 motion, he moved for leave to file an
13 amended pleading which withdraws all of his state law counterclaims. ECF No.
14 21. He has not addressed the merits of these claims and, as such, has made no
15 showing whatsoever that he had even a remote chance of prevailing on the subject
16 counterclaims.

17 Even a cursory review of Defendant's state law counterclaim refutes his
18 argument that applying RCW 4.24.525 would be absurd. As explained in
19 Plaintiff's motions, ECF No. 20 at pp.5-7, each of these claims seeks recourse for
20 actions taken in this litigation or incident thereto. There is nothing absurd about
21 Plaintiff moving to strike counterclaims which on their face seek to retaliate
22 against it for its petitioning this Court for redress resulting from the infringement
23 of its copyright.

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Defendant's assertion that Plaintiff's special motion to strike is moot also lacks merit. ECF No. 25 at p. 9. After claiming on the one hand that the motion is moot because he seeks to withdraw the subject counterclaims, he then purports to reserve "the right to re-instate a CPA claim depending on the resolution of the motion." Defendant chose to assert these ill conceived counterclaims, which required Plaintiff's counsel to expend a considerable amount of time fashioning a response, now seeks to withdraw these claims while attempting to retain the right to re-file some or all of them. Such machinations should not be countenanced.

II Defendant's Counterclaims for Declaratory Relief Should Be Dismissed.

With respect to his counterclaim seeking a declaration of non-infringement, Defendant ignores the fact that this claim is redundant and the mirror image of Plaintiff's claim for copyright infringement. He also ignores fundamental principles of claim and issue preclusion, arguing that after this matter is resolved he could face claims by other parties for the subject infringement. ECF No. 25 at p. 10. Similarly, he ignores the fact that his claim for a declaration of copyright misuse constitutes an affirmative defense and not a claim for relief. *Id.* None of these positions are well taken for the reasons set forth in Plaintiff's motions, ECF No. 20 at pp. 10-11.

With respect to his Count 3, Defendant's arguments are based on his proposed second amended answer. ECF No. 25 at pp. 10-11. As of this date, he has not been granted leave to file this pleading and Plaintiff's motions concern his first amended answer. Because his attempted fix of this count is flawed, Plaintiff will address this issue in the event that the Court grants Defendant leave to file a

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1 second amended answer. Defendant fails to address Plaintiff's position that Count
 2 3 should be dismissed under the prudential doctrine of primary jurisdiction. ECF
 3 No. 20 at p. 11.

4 With respect to his state law counterclaims, Defendant simply rehashes his
 5 untenable explanation as to why he seeks to drop these claims. ECF No. 25 at p.
 6 11. He previously addressed this issue in his motion for leave to file a second
 7 amended answer, ECF No. 21 at p. 5, and Plaintiff has addressed this issue in its
 8 response to that motion, ECF No. 24 at pp. 5-6. In short, Defendant claims that
 9 two of his state law counterclaims are moot because he has terminated his
 10 relationship with Comcast. He still fails to explain how this termination renders
 11 these claims moot if in fact he had a good faith basis for alleging them in the first
 12 place.

13 With respect to his counterclaim for alleged violation of Washington's
 14 Consumer Protection Act, Defendant asserts that he seeks to drop it "for
 15 convenience of the present procedural posture." ECF No. 25 at p. 11. In all
 16 candor, Plaintiff cannot respond to this because it does not understand what
 17 Defendant is asserting.

18 Lastly with respect to Plaintiff's motion to dismiss under Fed. R. Civ. P.
 19 12(b)(6), Defendant argues that the *Noerr-Pennington* doctrine is inapplicable
 20 because he "has brought no antitrust counterclaims." ECF No. 25 at p. 12. As
 21 noted in Plaintiff's motions, this doctrine has been extended beyond the antitrust
 22 context and, indeed, applied by the Ninth Circuit to circumstances substantially
 23 analogous to those at issue here. *See* ECF No. 20 at pp. 8-9 (discussing *Sosa v.*

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1 *DirectTV, Inc.*, 437 F.3d 923 (9th Cir. 2006).

2 **III Defendant's First Amended Answer Alleges Fraud and Fails to Plead**
These Allegations with Sufficient Particularity

3 Although his first amended answer is replete with allegations that Plaintiff
4 is engaged in some sort of fraudulent enterprise, Defendant fails to state his
5 affirmative defenses and counterclaims based on such allegations with the
6 particularity required by Fed. R. Civ. P. 9(b). While his responsive pleading
7 contains several lengthy narratives and voluminous attachments, he fails to
8 identify what portion of these materials relate to any given counterclaim or
9 affirmative defense. As such, even if the Court declines to strike this material, it
10 fails to amount to the pleading with particularity required by Fed. R. Civ. P. 9(b).

11 **IV Plaintiff's Fed. R. Civ. P. 12(f) Motion Should Be Granted**

12 Defendant asserts that he is "entitled to allege his affirmative defenses
13 on information and belief." ECF No. 25 at p. 13. This does not, of course, afford
14 him license to file a pleading in contravention of the Federal Rules of Civil
15 Procedure that is replete with extraneous and irrelevant material. It also does not
16 allow him to file massive responsive pleadings which attempt to circumvent the
17 Federal Rules of Evidence by proffering numerous documents and baseless factual
18 assertions, presumably in an effort to sway the trier of fact with material which is
19 either legally irrelevant, inadmissible, or both. Federal Rule of Civil Procedure
20 8(b)(1) mandates that Defendant "state in short and plain terms its defenses to each
21 claim asserted against it . . ." Defendant has failed to comply with this
22 requirement.

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CONCLUSION

In light of the foregoing, Plaintiff respectfully submits that its motions in response to Defendant's first amended answer should be granted.

DATED: February 21, 2014

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